

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION**

<b>JOSEPH F. HUTCHISON, et al.</b>	)	<b>Case No. 1:01-789</b>
	)	
<b>Plaintiffs,</b>	)	<b>(Judge Beckwith)</b>
	)	
<b>-v-</b>	)	<b>(Magistrate Judge Hogan)</b>
	)	
<b>FIFTH THIRD BANCORP,</b>	)	<b>DEFENDANT’S SECOND MOTION TO</b>
	)	<b>RENEW MOTION FOR ATTORNEY’S</b>
<b>Defendant.</b>	)	<b>FEES AND MOTION FOR LEAVE TO</b>
	)	<b>FILE A SECOND AMENDED BILL OF</b>
	)	<b><u>COSTS</u></b>

Pursuant to this Court’s Order dated January 18, 2006 (T.d. 100) and in compliance with Federal Rule of Civil Procedure 54(d), Defendant Fifth Third Bancorp (“Fifth Third”) hereby moves to renew its motion for an award of attorneys’ fees under the Employee Retirement Income Security Act of 1974 (“ERISA”) and moves for leave to file a second amended bill of costs. Further, Fifth Third provides supplemental evidence of the fees and costs incurred since Fifth Third filed its original amended bill of costs (T.d. 93 & 94).

This motion is supported by Fifth Third’s original bill of costs (T.d. 93), Fifth Third’s motion for an award of attorneys’ fees (T.d. 94), Fifth Third’s reply memorandum in support of its motion for an award of attorneys’ fees (T.d. 98), Fifth Third’s motion to renew motion for attorney’s fees and amended bill of costs (T.d. 103), and the attached memorandum, supporting Declaration of Patrick F. Fischer and second amended bill of costs, which are attached as Exhibits A and B to the memorandum, respectively.

- 2 -

Respectfully submitted,

s/ Patrick F. Fischer

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**MEMORANDUM IN SUPPORT****I. INTRODUCTION**

On October 7, 2005, this Court granted Defendant Fifth Third's motion for summary judgment and denied Plaintiffs' cross motion for summary judgment. (T.d. 91). In that decision, this Court held that Fifth Third did not, as a matter of law, breach fiduciary duties under the Employee Retirement Income Security Act, 29 U.S.C. § 1104, when it amended the Suburban Bancorporation Employee Stock Ownership Plan (the "ESOP") to allow participation in the plan by Fifth Third employees. (*Id.* at p. 11). After the opinion was filed, Plaintiffs filed a notice of appeal and Fifth Third moved for an award of costs and attorney's fees pursuant to Fed. R. Civ. P. 54(D) and 29 U.S.C. § 1132(g). (T.d. 92, 93 & 94). Pursuant to that original motion, Fifth Third sought fees in the amount of \$206,531.24 (Fifth Third has since discovered that its calculations were incorrect and Fifth Third should have claimed \$186,531.24.) (T.d. 94) Simultaneously, Fifth Third filed a Bill of Cost for \$7,843.16. (T.d. 93)

On January 18, 2006, citing reasons of judicial economy, this Court denied without prejudice Fifth Third's motion for attorney fees pending the outcome of Plaintiffs' appeal. (T.d. 100). On appeal, the Plaintiffs only challenged the dismissal of their state law breach of contract claim. (T.d. 96). Relying on the 2004 Supreme Court Opinion in *Aetna Health, Inc. v. Davila*, 542 U.S. 2000 (2004) and consistent with Sixth Circuit case law, the Sixth Circuit reaffirmed this Court's holding that the state law claim was preempted by ERISA. (*Hutchison v. Fifth Third Bancorp.* (Nov. 30, 2006), No. 05-04389, p. 4; attached as Exhibit C).

After the Sixth Circuit so ruled, Fifth Third filed a motion to renew its motion for attorney fees and moved for leave to file an amended bill of costs. (T.d. 103). The motion

sought \$285,259.09<sup>1</sup> in attorney's fees and attached an amended Bill of Costs for \$8,482.18. The Plaintiffs then filed a notice of status of appeal, notifying this Court of their intention to file a petition for writ of certiorari. (T.d. 104). Upon receiving such notice, on January 3, 2007, this Court entered a notation order extending this Court's January 18, 2006 Order, which held in abeyance Fifth Third's fee petition until the ultimate conclusion of all appellate proceedings.

On April 4, 2007, Plaintiffs filed a petition for writ of certiorari with the Supreme Court of the United States. (T.d. 108). The Supreme Court denied the Petition on June 25, 2007. (*Hutchison v. Fifth Third Bancorp*, U.S., No. 06-1387, *cert. denied* 6/25/07, Order denying Petition attached as Exhibit D.) Presumably, the Supreme Court denied certiorari review because the Sixth Circuit's decision was consistent with ERISA preemption as defined by the Supreme Court in *Davila* and because the Supreme Court does not recognize any alleged circuit split with respect to the "dual capacity doctrine."<sup>2</sup> Given that all appeals are now concluded, Fifth Third brings this second motion to renew its motion for attorney's fees and for leave to file a second amended bill of costs.

## II. ARGUMENT

Pursuant to Fed. R. 54(D) and 20 U.S.C. § 1132(g), Defendant Fifth Third now files this second motion to renew its motion for attorney fees and for leave to file a second amended bill of costs.<sup>3</sup> Since filing its first amended bill of costs, Fifth Third has incurred a total of \$304,168.68 in attorneys' fees, or an additional \$38,909.59 in attorneys' fees since the filing of Fifth Third's

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<sup>1</sup> Based upon the recalculation of the amount of fees claimed in the initial motion for attorney's fees, the amount claimed should have been \$265,259.09.

<sup>2</sup> Moreover, Petitioners never raised this so-called "dual capacity" argument/term to the trial court and instead crafted the argument/term for the first time on appeal.

<sup>3</sup> Rule 54(D) provides that costs *shall* be allowed to the prevailing party.

last motion for attorney's fees. Fifth Third's costs have also increased to a total of \$10,415.18, as reflected in the second amended Bill of Costs.

As more fully briefed in Fifth Third's previous memoranda in support of its motion for attorneys fees, Plaintiffs unreasonably pursued this litigation, refused to engage in realistic settlement negotiations, unpardonably fostered extended motion practice, and thereby inflated Fifth Third's legal fees. Within the last week, Plaintiffs rebuffed Fifth Third's attempt to settle the remaining issue of attorneys fees and costs. (*See* Fischer Decl, ¶3.) After the Supreme Court denied Plaintiffs' petition, Fifth Third approached Plaintiffs and expressed its intent to renew its motion for attorneys' fees under the ERISA statute but offered to enter into settlement negotiations concerning those fees. Plaintiffs rebuffed that idea and refused to even consider settlement. (*See id.*) Because Plaintiffs are responsible for the manner in which this case was handled, Plaintiffs and/or their counsel should be held responsible for all or some of Fifth Third's fees.

### **III. CONCLUSION**

For these reasons and the reasons stated in Defendant's motion for an award of attorneys' fees and the memoranda in support, Fifth Third respectfully requests that this Court grant its second motion to renew, allow Fifth Third to file a second amended Bill of Costs, and award Fifth Third its defense fees in the amount of \$304,235.68 and its costs in the amount of \$10,415.18.

- 6 -

Respectfully submitted,

s/ Patrick F. Fischer

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#### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing **DEFENDANT'S SECOND MOTION TO RENEW MOTION FOR ATTORNEY'S FEES AND MOTION FOR LEAVE TO FILE A SECOND AMENDED BILL OF COSTS** was served upon Richard G. Meyer, William J. Moran, and John R. Kirk, Deters, Benzinger & Lavelle, PSC, Thomas More Park, 207 Thomas More Parkway, Crestview Hills, KY 41017-2596 via the Court's electronic docket, this 9th day of July, 2007.

s/ Patrick F. Fischer

Patrick F. Fischer